January 14, 2003

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **L01SAX13 & L01VA016**

JOE HAENER
Reasonable Use Application and Variance Application Appeals

Location: 18809 Southeast 65th Place

Appellant/
Applicant: Joe Haener, *represented by*
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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:	Deny in part, grant in part
Department's Final Recommendation:	Deny in part, grant in part
Examiner's Decision:	Variances denied Reasonable use exception granted Appeals denied

EXAMINER PROCEEDINGS:

Hearing Opened:	November 14, 2002
Hearing Closed:	December 3, 2002

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

ISSUES/TOPICS ADDRESSED:

- Steep slopes
- Buffer area
- ? Variance
- ? Reasonable use exception

SUMMARY:

Denies variance appeal regarding steep slopes encroachment. Grants reasonable use exception for septic drainfield.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. Joe Haener requested from the Department of Development and Environmental Services ("DDES" or "Department") a Reasonable Use Exception ("RUE") from sensitive area requirements in order to legalize a drainfield located on protected sensitive areas—slopes over 40 percent.

   Haener also requested a variance to construct a 33.25 square foot deck extension to the existing residence and to legalize a pool complex consisting of retaining walls, pool, patio, deck area, related structures and rockeries within the 50-foot sensitive area buffer, minimizing the buffer to approximately one foot from the steep slope. Haener requested a reduction and elimination (on portions of the site) of the 15-foot wide building setback area from the steep slope buffer ("BSBL"). Haener's site plan is incorporated in this hearing record as exhibit no. 2-6.

Public records confirm that the Applicant, Joe Haener is a contractor and has obtained permits from DDES for numerous projects on behalf of clients. Mr. Haener is licensed in Washington and operates a construction firm, Haener Construction Services, Inc.

2. Based on its administrative findings and analysis, DDES denied all variance requests for additional development within the steep slope buffer and BSBL beyond the house footprint approved in 1993 as Variance L93VA010, but granted the RUE for the present location of the drainfield and reserve area on steep slopes of the property, subject to the following conditions of approval:

   A. A revised site plan accurately depicting approval of the house built under L93VA010; approval of the reasonable use exception; and, accurate location of the top of the steep slope, 10-foot buffer and 15-foot BSBL, shall be submitted for the reasonable use file record, and for reference in other development permits. Final development plans must be submitted and approved by LUSD's[1] staff geologist prior to issuance of a clearing and grading and/or building permit.

   B. Prior to issuance of a clearing and grading and/or building permit the owner shall file a revised sensitive areas notice on title with King County records and elections department that updates notes on the site plan map page referencing approval of the reasonable use exception for the drainfield.

   C. Following the recommendations of Associated Earth Sciences in their report of February 15, 2002 (exhibit no. 2-5, p. 17), the loose straw covering the drainfield shall be replaced with long-term-erosion-control matting. Woody vegetation shall be planted between each lateral drain and along the bottom edge of the last downslope drain. This planting plan must be reviewed and approved by the LUSD geotechnical engineer.

   D. All portions of the steep slope outside of the primary drainfield on which existing vegetation was altered shall be restored in accordance with the Sensitive Area Mitigation Guidelines developed by King County.

   E. Remove all structures within the 10-foot steep slope buffer and 15-foot BSBL and restore the 10-foot-wide steep slope buffer. Buffer restoration shall utilize native vegetation in accordance with the Sensitive Area Mitigation Guidelines.

   F. All steep slope and buffer restoration described above shall be approved, bonded, and all plantings installed prior to finalizing the building permit for house remodeling (B00M2296). Both slope and buffer restoration can be covered by one planting plan and reviewed under the building permit for the house. The plantings must be inspected and approved by a representative of the Sensitive Areas Section of King County DDES.

3. Haener now appeals the Department's decision to deny the variance and to apply RUE conditions related to variance approval—based on the arguments discussed in the conclusions below. The

[1] Land Use Services Division, a division of DDES.

Examiner's hearing review is *de novo*. In addition to a statement of appeal and written summary argument, Haener filed on October 15, 2002 a "clarification of legal issue" which states in part:

> Haener's only option was to appeal the DDES decision with respect to every variance criterion in order to demonstrate that DDES's denial of the variance was erroneous.

4. Palmer Well No. 1 Water Association ("Palmer") appeals the Department's approval of the RUE and opposes variance approval, expressing concerns regarding slope stability, impact on domestic water supply and effluent contamination of ground water.

5. In 1993, the Department granted Variance L93VA010 to construct a single-family residence in a regulated and protected sloped area exceeding 40 percent gradient. The house was constructed on the southwest corner of the site to accommodate the original location for the drainfield and reserve area north of the house. Both were located on the west end of the property. Only a portion of the footprint extended into the 40 percent steep slope area.

   In the decision to approve the 1993 variance, the required drainfield location served as partial justification for limiting the location of the house within steep slope, buffer and BSBL. The conditions of the 1993 variance are contained in exhibit no. 2-21.

6. Subsequent to the 1993 variance approval, the previous owner of the subject property constructed a house pursuant to building permit (DDES file nos. B93R3195 and B94Q0755). The Seattle-King County Department of Public Health ("Health Department") approved a three-bedroom house with three floor levels and crawl area under the house. Each level had a deck area. A hot tub was constructed on the deck of the main floor (current plans label this level as the second floor). The house was 3824 square feet (not including garage and decks). Approved deck area totaled 665 square feet.

7. Applicant Haener remodeled the house in 1999 without applying for building permit(s), adding a new deck area, enclosing the existing deck area and finishing the crawl area as living space. A fourth bedroom was added on what is now called the first floor in his architectural plans. The hot tub was relocated from the second floor to the first floor level. The house now includes 4,521 square feet of floor area, 1,253 square feet of deck, plus a garage. The pool, retaining wall supporting the pool and pool deck surface, and proposed deck stair extension from the house to the pool area ("pool complex") are all within the buffer area of the steep slope and BSBL[2].

8. Haener relocated the drainfield and reserve area onto the steep slope after the approved and active drainfield (plus reserve areas) were damaged by grading and site work for the pool being constructed on site according to Robin Owen (the drainfield designer) in a phone conversation with staff on 9/24/01. Other statements in the file suggest that the drainfield was relocated to accommodate the fourth bedroom (Geotechnical & Hydrogeological Study, exhibit no. 2-5, p. 5). Finding a health risk to the property and community (downhill community well), the Health Department worked with the property owner to expeditiously relocate the drainfield. Exhibit nos. 2-14, 2-15, 2-16, 15; testimony, Ketchel. After the site

[2] Haener contests the Department's top-of-slope determination as discussed later in finding nos. 22 and 23, and conclusion no.9.

damage, the only suitable location found on site by the Health Department was on the slope over 40 percent just east of the house. The Health Department approved the relocation of the drainfield and in doing so also signed approval for a drainfield system for four bedrooms. The previous drainfield was approved for three bedrooms and although the fourth bedroom was constructed, a building permit for a fourth bedroom had not yet been requested or approved. Haener contends that at least some portion of the old drainfield corruption occurred due to actions of the previous property owner, but the evidence of record does not support such a finding.

9. The pool complex (retaining walls, pool, pool deck and grotto) were completed in 1999 without benefit of sensitive area variances or building permit. The Department received a code enforcement complaint and opened an enforcement file on January 7, 2000, after a determination that permits were not obtained to construct the pool complex. That code enforcement action is presently held in abeyance (administratively, by DDES) pending the outcome of these proceedings.

10. Haener submitted an as-built ("ABC") building permit application in November of 2000 to legalize the additions, remodel and pool complex (DDES file no. B00M2296). Department review of the building permit is pending this decision regarding the RUE and variance requests.

11. DDES policy in 1993 would allow deck area to be enclosed for use as living space of a house with a building permit provided that all zoning conditions were met. Deck area is considered as impervious surface area for the purpose of drainage review. In the case of a variance, DDES would also consider the limitations imposed in allowing enclosure of deck area and the modifications to a structure, since by enclosing a deck the usable outdoor area available may be reduced. After review of the previous variance and King County Codes, DDES determined that those additions to the house since 1994-95 that were within the existing house footprint would be allowed without submittal and approval of another variance, provided that an RUE for the drainfield could be obtained allowing a fourth bedroom and provided that approval of the building permit for construction could be obtained.

    In its geotechnical review for the project, DDES administratively approved a reduction to the required 50-foot slope buffer down to a 10-foot buffer as allowed under KCC 21A.24.310. Although the code requires a 15-foot wide BSBL, the Department approved a BSBL reduction to 5 feet surrounding the house under the 1993 variance approval.

12. The property is located on the northeast side of Cougar Mountain. It is the last developed property on the private drive of SE 65th Place. Cougar Mountain Park is located two properties beyond to the south. The property directly to the south is undeveloped, while other residentially developed properties are on the other sides. The subject property is approximately 1.37 acres in area and is irregularly shaped. The highest portion of the property is on the west side and is outside of the steep slope and buffer areas. The property is developed with a single-family residence, constructed in 1994-1995. Subsequently, substantial exterior improvements were made by enclosing the deck area and converting area under the home into storage and living space.

13. Site elevation drops from 500 feet to 380 feet over a distance of 400 feet. The majority of the site contains slopes exceeding 40 percent and are therefore subject to sensitive areas regulations. The remainder of the site is also mostly sloped. On the far west side of the property, next to the house, the property has been terraced (see finding nos. 7 and 8, above). There is an existing logging roadbed that forms an 'S' shape across the lower central and east portions of the property.

14. Soils are described in the geotechnical and hydrogeological study dated February 15, 2002, by Associated Earth Sciences, Inc. (Exhibit no. 2-5) as:

> . . . mantled with a surficial soil layer of very loose to loose, silty sand with fine to coarse gravel overlying weathered, fractured sandstone bedrock. The surficial soil layer ranges from 2 to 5 feet thick and typically consists of an upper zone of forest duff and topsoil mixed with colluvium, and a lower zone of highly weathered bedrock (chiefly fine, silty sand with gravel derived from bedrock). Colluvium, as used in this letter-report, consists of soil and organic material that has moved downslope by the process of gravity over a period of time and at this site includes landslide soils and/or soils that have moved downslope by slow creeping of the surficial soil layer.

Signs of slow downslope creep of surficial soils were observed by the geologist. However, signs of slope instability, such as sloughing or landsliding, were not observed near the lateral absorption trenches installed as part of the new septic system. The presence of past slides was observed on the adjacent properties both north and south (exhibit no. 2-5, p. 13).

15. The geotechnical and hydrogeological study (Exhibit no. 2-5) indicates that there are no significant flows of surface water coming from off-site sources or direct precipitation. Not all roof drains were observed as being connected to the tightline drain. Groundwater seepage (spring seepage) was not observed within the surficial soil units during the site visits by Associated Earth Sciences, Inc. King County staff did observe some visible signs of slope erosion and the need to convey all stormwater to a stable discharge point at the toe of the slope (December 6, 2000 letter from Brian Norton, BSD Engineer; Exhibit no. 2-11).

16. With slopes of 43 percent, the majority of the site is classified as a steep slope hazard area as defined by KCC 21A.24. On the far west end of the site, north of the house and driveway, is a 2,500 square foot area outside of the steep slope buffer and BSBL. Approximately 1,800 square feet of this area (60 feet by 30 feet) is outside of the 10-foot front setback required by the zoning code and is usable area. Previously this area contained a portion of the original drainfield system (1993 approval). See finding nos. 22 and 23, below, regarding top of slope delineation

17. Water is provided from a community well located on the lower, eastern portion of the site. Public sewer service is unavailable to the site. Mr. Haener has indicated that water is trucked in and out of the site for pool use, while the neighbors contend that they have never seen a water truck at the property and that a water line is connected to the pool. Neither the Applicant nor the neighbors submitted documentation supporting their claims.

18. The current septic/drainfield system is located uphill from the community well and just down hill from the residence on slopes exceeding 40 percent gradient. The system is designed to

accommodate the original house design and the fourth bedroom addition for which an ABC permit application is pending. The design provides for a maximum discharge of 570 gallons over an absorption area of 490 linear feet by 2 feet wide. Effluent water from the system is sprayed into the drainfield at a rate of 95 gallons per each of 6 doses per day with each dose lasting 1.1 minutes.

To reduce short term risk of erosion, hand cast seeds were planted and loose straw was placed over the drainfield area. DDES staff observed that the loose straw over drainfield area is 50 to 75 percent decomposed.

19. In a November 13, 2001 memo, Jeff Ketchel of the Health Department had the following comments regarding the applications:

> In response to the concerns raised regarding the well found downslope of the septic system repair at the above property, we conducted a field visit on November 9, 2001, to verify minimum horizontal separation between the on-site septic system (OSS) and existing public well. Our field measurements concluded the well to be over 100 feet horizontally away from the OSS, which is the minimum required in King County Board of Health Title 13.
>
> With the damage done to the previous OSS, a new system was required so sewage would not be discharged on the surface of the ground, which is a threat to public health. The system approved by this office and installed met our highest treatment standards. The system includes aerobic pretreatment of the sewage followed by disinfection with a UV light. The sewage is then equally distributed via pressure to the drainfield. The OSS is on a maintenance contract that includes semi-annual inspections by Aquatest, Inc.

Additionally, Mr. Ketchel stated in testimony and in a May 9, 2002, e-mail that,

> Replacing the drainfield to its original location would not be feasible due to soil removal and disturbance. King County Board of Health Title 13 does not allow drainfields installed in disturbed soils. The area where the pool now sits has been heavily disturbed.

The Health Department has approved the drainfield and finds that it is a safe distance from the well(s). DDES determined that there is no other alternative location for a drainfield on or off site, which would be located outside of a steep slope area. The current drainfield and reserve area previously received approval by the Health Department. The Health Department in review of these applications maintains that the drainfield continues to be safe and functions properly. DDES concludes that, provided conditions of this decision are met, the drainfield will not pose an unreasonable threat to the public health, safety and welfare on or off site.

Having reviewed the analysis by the Health Department and its own staff geologist, DDES concluded that the alterations made to the steep slope for a drainfield are considered to be the minimum necessary for reasonable use of the property as a four-bedroom residence.

20. Abutting property located to the southeast is undeveloped and wooded. Most other properties nearby are developed with single family homes designed to take advantage of views. According to King County Assessor records, all nearby homes are smaller in size than the current Haener home. Only two of 14 neighborhood homes are over 4,000 square feet. Six homes are between 3000 to 4000 square feet and five homes are less than 3000 square feet in size. Approximately half have 4 bedrooms and half have 3 bedrooms (one home has 2 bedrooms). These records do not contain information regarding pools or other structures on the properties. Exact intrusions into steep slope areas, buffers and setbacks on other properties are unknown. There have been no other variances and or reasonable use applications filed in the immediate area. Referencing the aerial photo submitted, it appears that two other homes nearby were built on slopes that might possibly be steep slopes. A retaining wall is present immediately next to a home located two parcels to the north of the Haener property, however, no other structures, such as pools, are visible in the photos in evidence.

21. KCC 21A.08 establishes the uses allowed in the R-1-P zone classification. There are a variety of uses allowed in the R-1-P zone including residential. Other uses would likely have the same or possibly greater impacts on the sensitive area. Other uses permitted, such as a park, could have less impact on the property but are not considered to be a reasonable use of the property given the existing house, property location, slope, and access. The P-suffix designation on the property refers to special conditions for new development that is within the Lake Sammamish drainage basin.

    KCC 21A.24.310 does not allow the construction of a house, retaining walls, or drainfield as an alteration on slopes greater than 40 percent. Additionally, KCC 21A.44.030 precludes submittal of a variance from the provisions of KCC 21A.24, which prohibit alteration of a steep slope sensitive area. Variances can only be requested from the buffer area adjacent to steep slopes. Therefore, DDES recommended to Haener that he file a RUE application to legalize the drainfield. The Department reviewed the other improvements within the buffer and building setback area pursuant to the criteria for variance.

22. DDES disagrees with the line(s) defining top of slope on Haener's site plans. Based on the topography information provided, a different top of slope line was drawn by DDES staff. As a result, Haener's calculations of area (square footage intrusion into the buffer and BSBL) are inaccurate according to DDES. DDES relies upon current information—on the ground, existing contours. The Appellant's architect eschewed that information, instead relying upon a mathematical interpolation of two older top of slope indications thereby creating a fictitious top of slope determination.

23. The current notice on title was required in 1993 prior to construction of the original home. DDES argues that the notice on title map is a conceptual sketch only generally showing the location of steep slopes on the map. DDES seeks a revised notice on title in conjunction with approval of a RUE and/or variance—in order to provide reference to the alteration of the steep slope, buffers or BSBL allowed by the approved RUE and to provide appropriate file numbers.

    The 1993 notice on title filed pursuant to King County sensitive areas code (as a condition of building permit approval) generally described the location of the steep slope. The notice states in part:

The location of this/these sensitive area setback area(s) is/are not surveyed. All sensitive area(s) may be subject to further review upon any alteration of the site or its sensitive area(s). Note: The house location approved under King County Permit B93R3195 is allowed within the setback area per approved variance L93VA010. Any future alterations shall be subject to King County Code.

24. DDES received a number of comment letters from neighboring property owners regarding the RUE and variance requests. DDES reports the following concerns and positions of neighboring property owners:

A. "Further development beyond that granted under the variance approved in 1993 should not be granted."

B. "Safety of drinking water due to the proximity of the relocated drainfield may be jeopardized."

C. "Pool and sprinkler system of the Haener property uses a disproportional amount of water from the private community well."

D. "Permits were not applied for prior to construction, although Mr. Haener is a professional contractor and has done work in King County."

25. The deck/building area beyond the house footprint is considered for variance because it was not considered within the previous variance application. Haener argues that an increase of the footprint of the residence is needed for an additional 33.25 square feet of deck in order to assure safe egress from the remodeled residence. Haener enclosed the deck area, added a bedroom and made various other modifications to the house now containing approximately 4,500 square feet of floor area, and 1,200 square feet of deck(s), making the current home the largest in the neighborhood.

26. Aerial photos in evidence do not indicate whether nearby residences have pools, pool decks and retaining walls in sensitive areas, buffers and building setbacks. *The Applicant's submittal makes general reference to such structures nearby but does not provide any supporting evidence.* The burden of proof, of course, is on the Appellant/Applicant.

27. As presently constructed, the retaining walls for the pool and pool deck were not constructed in a manner which would be acceptable to King County because the pool retaining wall is not founded on suitable soils (exhibit no. 2-5). The geologist's report and testimony indicates that those foundations for the pool complex would need to be improved with underpinning or excavation of loose soils and the pouring of a wider foundation. Additionally, the report states that the fill soils on the steep slope present a risk of future downslope creeping or slumping and that there is an inherent risk of slope movement on the steep slopes of the property. The author of that report, however, testifies that affordable engineering solutions exist to address those concerns. Moreover, Haener agrees to commit to those engineering remedies. Detailed engineering review does not occur until after variance review is complete.

CONCLUSIONS:

1. Appellant Haener correctly argues that he should not be penalized for code violation through the variance review process. That penalty more properly falls within the purview of code enforcement. *Nor should the Appellant be rewarded for code violation*. The fact that illegal (unpermitted and unapproved) structures and developments exist on the property does not provide cause to approve them. We see no evidence in this hearing record that DDES has either sought to penalize or reward Appellant Haener through its decisions related to the variance and RUE decisions. Rather, DDES has properly approached the matter as a blank slate, evaluating the *proposal* on its merits with respect to applicable code.

2. Strict enforcement of the zoning code provisions that apply to this property do not create an unnecessary hardship to the property owner. The immense home on the property, approved by variance in 1993, paints no picture of hardship. More to the point, however, an area suitable for swimming pool placement that complies with zoning standards, exists on the property. Appellant Haener opposes that location because, he argues, it would be inconvenient and would necessitate an "unsanitary" site preparation project (due to the previous drainfield use of the area). He argues also that the zoning compliant location, if required, would "penalize" him for having constructed the swimming pool somewhere else.

   Inconvenience is not "hardship." The hearing record contains not a shred of evidence that the zoning compliant swimming pool location is unworkable or cannot be engineered appropriately. Appellant Haener argues that the zoning compliant location shouldn't even be on the table because his preferred location was the only location applied for. To accept that argument would make determination of "unnecessary hardship" caused by strict enforcement of the code and "minimum necessary" an impossible task. We must examine the entire parcel (lot) in order to determine whether the deviation (variance) from the zoning code must be approved to avoid "unnecessary hardship" and to assure that any intrusion into protected sensitive areas is the "minimum necessary."

   When we look at the Haener plot plan and we see a location that is zoning compliant within which a swimming pool could be installed, we cannot conclude that KCC Title 21A (which includes the sensitive areas regulations) imposes an unnecessary hardship upon either the property or the property owner. Therefore, the Haener proposal does not comply with the variance criteria established by KCC 21A.44.030.A.

3. In *Cummings, et al. v. City of Seattle*, et al., 935 P2^{d} 663; 97 Wn. App., Lexis 667, the court overturned an Examiner's ruling concerning unnecessary hardship, concluding that there was no showing in that hearing record that construction of a smaller building than Cummings proposed would deny Cummings a reasonable use of and return from their property. The court stated:

   > The chief problem with the Hearing Examiner's resolution of this issue is that he assumed a building of the proposed dimensions and did not consider that one of smaller dimensions might be required by other criteria. We believe this criterion must be read together with criterion for 4 [undue and unnecessary hardship], which we have already addressed. There, we concluded that there must be a showing that a smaller building would not provide the Leongs with a reasonable return before there could be a determination of whether there was undue and

> unnecessary hardship. Pending that determination, there is insufficient evidence in the record to show that the variance is the "minimum necessary to afford relief."

The *Cummings* court looked to *City and Borough of Juneau v. Thibodeau*, 595 Pacific 2d 626, 634 (Ak.,1979), *State V. Winnebago County*, 196 Wi. 2d 836 (1995) and several other cases and concluded that undue and unnecessary hardship does not mean "practical difficulty." Rather, the *Cummings* court applied a "remaining reasonable use" standard to interpret unnecessary hardship. The *Cummings* decision applies remarkably well to the facts in the instant case.

In *Martell, et al. v. City of Vancouver*, 35 Wn. App. 250, 666 P.2d 916 (1983) the court found that unnecessary hardship that will support a variance must relate to the land itself and not to the owner/applicant. From *Anderson's American Law of Zoning*, 4th edition by Kenneth H. Young (Clark Boardman Callaghan, 1996):

> In a 1992 decision, the Rhode Island supreme court stated that unnecessary hardship exists when restricting the property to the permitted use within the zoning ordinance will deprive the property owner of all beneficial use of the property and… granting a variance becomes necessary to avoid an indirect confiscation of the property.[3]

Anderson observes, based upon a review of cases nationwide, that "it is not enough for an applicant to show that his current use is unprofitable" in order to obtain a variance. Also based upon the Anderson review of case law, at pages 564 and 565, "a reasonable use variance may not be granted to relieve hardship which was self-created." At page 574, Anderson continues:

> Hardship is self-created when it is caused by improvements to the land constructed by the applicant with knowledge of the restrictions from which he seeks relief. Where hardship results from improvement of land under such circumstances, it stems from the "reckless" conduct of the applicant rather than the application of the zoning regulations.

Anderson at page 575:

> Clearly, hardship is self-created where it results from an improvement made without a building permit and in violation of the law.

A consideration of "unnecessary hardship" inherently and necessarily includes a consideration of whether the hardship is self-created. The Haener application and appeal provides no basis upon which to conclude that this variance application must be approved due to "unnecessary hardship." The existing pool complex locations results from professional contractor Haener's reckless conduct. The variance request merits no approval under the "unnecessary hardship" standard given these facts.

4. The hearing record contains no convincing evidence that the subject property is denied rights and privileges enjoyed by other properties in the vicinity and same zone. Although Appellant Haener

[3] *O.K. Properties v. Zoning Board of Review*, 601 A.2d 953 (1992, RI).

makes such claims, the evidentiary record does not support them. The hearing record contains no evidence of similar developments within protected steep slopes areas in the neighborhood; and, moreover, contains no evidence of such developments anywhere in the neighborhood. The Department's inability to confirm such claims does not support the Applicant/Appellant's burden of proof. Curiously, the Applicant/Appellant's summary argument makes no mention of this variance criterion. We conclude that the proposed pool complex also fails to comply with KCC 21A.44.030.C.

Haener argues that having the largest house in the neighborhood is not a good enough reason to rule against a variance application involving such criteria as "unnecessary hardship" and "minimum necessary." Moreover, Appellant Haener argues, there is no information in the record to support the DDES assertion that the Haener residence is the largest in the neighborhood; no information "to inform… whether this residence is disproportionately larger or only slightly larger." That is Haener's problem because the burden of proof belongs to the Applicant/Appellant. Here we have a request for variance in which the Appellant must show that the subject property is deprived, by provisions of the zoning code, of rights and privileges enjoyed by other properties in the vicinity and under identical zone, *yet the Appellant concedes that the hearing record contains no information addressing this issue!*

5. The Palmer appeal principally concerns KCC 21A.44.030.D and KCC 21A.24.070.B, the variance and RUE criteria which call for confirmation that the proposal will not present a health or safety hazard, that it will not be materially detrimental to the public welfare, and that it will not be unduly injurious to property or improvements in the vicinity. Palmer expresses concern that the pool complex will consume excessive well water from their limited supply system. Such consumption could interfere with required fire engineering standards regarding water pressure, flow quantity and flow duration.

   Appellant Haener dismissed these concerns as "not before the Examiner" and as "a private matter." We disagree. Given that the domestic water source is a community well serving only a few homes, how can excessive water consumption *not* be related to public health, safety and welfare? Nonetheless, the hearing record does not support Appellant Palmer on this issue. For instance, it contains no consumption records that might verify the risks claimed by Appellant Palmer. Appellant Palmer's claim that Haener replenishes pool water from the community well is disputed by Haener. Thus, the dispute becomes a sort of "he said/she said" situation. Under such circumstances, we cannot conclude that Appellant Palmer has carried its burden of proof.

   The record shows substantial evidence and argument supporting Appellant Haener's argument that the pool complex may be engineered in such a manner that it will not impose a structural or geological, health or safety hazard, that it will not be materially detrimental to the public welfare for such reasons and, therefore, will not be unduly injurious to properties or improvements in the vicinity for such reasons. If KCC 21A.44.030.D were the only variance criterion, then the pool complex probably could be granted variance approval. But it is not.

6. KCC 21A.44.030.G prohibits granting a variance to relieve the property from "prior permit" conditions. However, that is precisely what variance approval of the building footprint addition and pool complex would do. It would provide relief from the conditions applied by the 1993 variance and associated permits. For instance, 1993 variance condition no. 6 states, in part:

> There shall be no vegetation disturbed on the steep slope beyond the footprint of the house, except for five feet around the perimeter of the foundation to allow for construction access and the minimal disturbance necessary for the storm drain and other utility line installation.

In addition, 1993 variance condition no. 2 requires that the residence shall be developed in substantial conformance to the site plan dated March 12, 1993. Appellant Haener would now rewrite those conditions through variance review. Such a rewrite (by granting variance approval of the present proposal) would clearly conflict with KCC 21A.44.030.G.[4] Failure to comply with this criterion must be added to the other conclusions in this report and decision that support denial of the variance request.

KCC 21.44.030.G also prohibits a variance from relieving the Applicant from "p-suffix" standards established pursuant to KCC 21A.38. The subject property is encumbered by such a p-suffix control—directed toward drainage and phosphorous control with respect to properties lying within the Lake Sammamish basin. The hearing record contains no evidence one way or the other regarding this portion of the KCC 21A.44.030.G criterion.

7. KCC 21A.44.030.J requires that the variance is the minimum necessary to grant relief to the Applicant. In response to the criterion, Haener argues that he has asked for variance approval for only what he has done and nothing in excess of that. As noted earlier, the Applicant should be neither penalized nor rewarded for what he has done (without required permits and approvals). In this case, "what has been done" constitutes an enormous encroachment upon the protected steep slopes of the subject property. To argue now that these structures and developments comprising the pool complex are the "minimum necessary" turns the criterion on its head. There is no variance criterion which grants relief from the Applicants own misjudgments and reckless disregard for applicable law.

Appellant Haener argues that DDES misinterprets this criterion by asking whether the variance itself is necessary. On the contrary, the first step in determining whether the proposal is the minimum necessary must be to consider whether it is necessary at all. Appellant Haener argues that an alternative location that fully complies with the zoning code is "irrelevant" because he is requesting variance approval only as shown in the Applicant's plans and drawings. This is a ridiculous argument. To apply this argument in any variance decision would prohibit DDES from considering the issues of "unnecessary hardship" and "minimum necessary," not to mention unique property characteristics. It need not be addressed further. See, however, conclusion no. 2, above, regarding the lack of evidence that a zoning code compliant location could not be developed due to "sanitary issues." But of course it can. There is no evidence in the hearing record supporting any other conclusion.

Washington case law regarding the term "minimum necessary" confirms the view that "minimum necessary" means precisely what it says—*minimum necessary*. See *Kenneth Renner v. Glenn and Heather Moses,* 97 Wn. App. Lexus 238, in which the court affirmed that "minimum necessary" was just enough to fill in the ruts of a road so that a vehicle would not drop down into

[4] KCC 20.20.020 classifies "land use permit decisions" into four types. "Type 2" includes zoning variance. KCC 20.20.030 provides for pre-application conferences for "permit applications." KCC 20.20.030.A states, in part, that "prior to filing a permit application requiring a type 2… decision, the applicant shall contact the department to schedule a pre-application conference…." Thus, we find that the code consistently regards type 2 decisions, including variances, as "permits."

them, *not* the placement of retaining walls and large amounts of gravel. For doing more than the minimum necessary, the trial court found Renner in contempt, an action which the appeals court affirmed.

8. Although an Examiner's decision does not establish legal precedent, the courts nonetheless require Examiner's decisions regarding similar issues and circumstances to be "consistent." In an appeal from code interpretation filed by John O'Neill, DDES file no. A01P0270, the Examiner concluded on August 20, 2002, that:

> The Appellant should be aware that in the event he proceeds with variance application, the "minimum necessary" standard has historically been rigorously enforced by both the Department and the Examiner on appeal. The Applicant may expect that the "minimum necessary" standard will apply to his property more strictly and more severely than the 3,000 square-foot guideline contained in the contested public rule (public rule 21A-24-019[D][3][a]).[5]

In the case of a variance appeal filed by James (Randy) Newell, DDES file no. L99VA006 and L99VA003 (August 20, 2002), the Examiner reduced a proposed home footprint size from approximately 3400 square feet to 2500 square feet (a reflection of the average home footprint size in the neighborhood). The Examiner concluded at page 7 of *Newell* (in part):

> The "minimum necessary" surely cannot mean "one-third larger than the *average* size of other homes in the neighborhood." Neither the Department nor the Applicant has offered any sound reasoning which would support a 30 percent larger footprint than the average home in this ecologically sensitive area. Surely, King County did not adopt the sensitive areas ordinance and other ESA related policies and regulations in order to so substantially increase impervious areas located within the minimum buffer area width of a salmonid bearing stream. The average footprint size is good enough for the neighborhood; it is good enough for this Applicant. Furthermore, requiring the variance recipient to construct a home consistent with the average home footprint in the surrounding area cannot be construed as denying reasonable use of the property.

There is no evidence in this review that either the Department's or this Examiner's interpretation of "minimum necessary" denies Haener reasonable use of the property.

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[5] The public rule referenced here establishes a number of guidelines to assist the Department when evaluating a proposal for variance, including the following:

1. Any proposed structure requiring a variance from setback or buffer requirements is as far from the sensitive area as practical;

2. Total building coverage and all other impervious surfaces are located to limit intrusion into the buffer and limit the amount of impervious surface within the buffer.

3. The proposal uses to the maximum extent possible the best available construction, design and development techniques that result in the least impact on the sensitive area and the buffer.…

9. Appellant Haener and DDES disagree regarding the correct elevational contour depicting "top of slope," an important determination to be made when considering unnecessary hardship and minimum necessary relief. Appellant Haener argues that DDES improperly interprets the top of slope and, in addition, that the top of slope indicated in the notice on title (recorded pursuant to the 1993 variance) should govern.

DDES relies upon current information—on the ground, existing contours. The Appellant's architect eschewed that information, instead relying upon a mathematical interpolation of two older top of slope indications thereby creating a fictitious top of slope determination.

We take notice of King County Public Rules chapter 21A-24, effective since May 10, 1991, as amended January 9, 1995, regarding the notice on title requirement for sensitive areas. Appellant Haener's challenge to DDES's top of slope measurements relies upon his assertion that the 1993 recorded notice on title cannot now be modified; that it should govern regardless of property owner modifications to the slopes during the intervening years. Public Rule 21A-24-944 describes the site plan required to be attached to a notice on title. Public Rule 21A-24-944.B states:

> If the setback area is surveyed, the site plan shall include the surveyed location of the setback area. If the setback area is *not surveyed*, the site plan shall include the *approximate location* of the setback area. (*Emphasis added.)*

The 1993 site plan contained in the notice on title depicts the presence of steep slopes on the subject property. It was not based on actual survey. Even if it were, Public Rule 21A-24-944.D also applies:

> Prior to attaching the site plan to the notice for recording, the Department shall review the depiction of sensitive area setback areas on the site plan. *The depiction shall be for informational purposes only, and setback areas may be established or modified by the Department, based on additional and/or subsequent evaluation.*

In this case, qualified experts representing the Department have evaluated the subject property and have identified the top of slope as it exists. The preponderance of evidence supports the determinations of the Department—made, incidentally, in the course of administering the zoning regulations and public rules for which they are responsible. The notice on title text itself declares that it is not an accurate survey, much as Haener wishes it were. Moreover, even if the top of slope delineation shown in the 1993 notice on title was based on accurate survey, conclusion no. 6, above, would still require variance denial.

10. Regarding the exterior deck additions constructed since 1993, Appellant Haener argues that DDES did not tell him that a variance was needed before issuing its final report. He states that this issue was "never discussed." Were this not a *de novo* review, one in which the Appellant challenges all variance criteria, this argument might warrant a remand for further consideration. In this case, however, all parties have had ample opportunity to argue the issue. There is certainly no basis to disregard the Applicant's proposal to expand the deck and building footprint beyond what was determined to be the "minimum necessary" in 1993.

Appellant Haener's final argument regarding the proposed deck area variance concerns safety. He argues that, without the deck, safe building egress would be jeopardized because exiting the building during (for instance) time of fire, would require leaving through two interior doors. The Appellant, with ample experience in the construction business, surely can figure out how to otherwise remedy that problem consistent with applicable code.

11. The Palmer appeal expresses concern regarding the impact of the new drain field on the community well below. I share their concern. This case presents steep slopes with a history of sloughage and instability on the subject property and neighboring properties. The slope has been cleared of dominant vegetation in order to install a drain field. The drain field will surcharge the ground comprising these steep slopes with effluent flows. However, a quasi-judicial decision cannot be based upon concerns. It must be based upon the evidence of record.

The preponderance of evidence in this hearing record—contained in the reports and testimony of Beckham, Stuth, and Health Department (Ketchel)—does not support our concerns. Haener's primary and reserve drain fields are outside of the 100-foot protective radius surrounding Palmer's community well. The 100-foot radius is required and enforced by the Health Department. Beckham testified there would be no impact on the well. Stuth testified there would be no impact on the drainfield or the well even if the pool was dumped. Stuth and Ketchel agree that the new drainfield is superior to the old one. Haener agrees to maintain a contractual relationship with an ongoing testing and monitoring company to assure continual proper drainfield function and operation. The preponderance of evidence supports approval of the new drainfield location.

12. Regarding the Haener building footprint and pool complex, the 1993 variance decision by DDES *already* applied the "minimum necessary" standard. How then can another "minimum necessary" relief be piled on top of that? Answer: it can't. Minimum necessary means *minimum necessary*. These circumstances amply support the conclusion that the principle of *res judicata* applies. Even if we were to conclude that *res judicata* does not strictly apply (probably because the issue was not actually adjudicated in 1993) it nonetheless makes no sense to revisit and reconsider "minimum necessary" ten years after it has already been decided. "Minimum necessary" is precisely what the previous owner placed upon the ground pursuant to variance and building permit a decade ago. The 1993 variance decision entered by DDES says so. There is no supportable basis to expand that determination today.

13. The criteria for allowing a reasonable use exception ("RUE") are established by KCC 21A.24.070.D. The septic drainfield proposal fares better under these criteria than the house additions and pool complex under the variance criteria. First, to be eligible for RUE review "if the application of this chapter [KCC 21A.24; environmentally sensitive areas] would deny all reasonable use of the property…" Without septic/drainfield approval, occupancy of the Haener property would not be possible. It therefore qualifies for review pursuant to the threshold criterion.

KCC 21A.24.070.B.1.b requires the Department to determine that there is no other reasonable use with less impact on the sensitive area. Unlike the building footprint addition and pool complex, there is no other area on the subject property suitable for drainfield use other than the area proposed (albeit that area is controversial). KCC 21A.24.070.B.1.c requires that the proposed development not pose an unreasonable threat to the public health, safety or welfare on

or off the development proposal site and that it is consistent with the general purposes of environmentally sensitive regulation and the public interest. Here again, considering the findings and conclusions above, the proposed septic drainfield does not pose an unreasonable threat to the public health, safety or welfare. See particularly finding no. 19 and conclusion nos. 4 and 5, preceding. Although the consistency of the septic drainfield proposal is controversial in neighborhood and is opposed by Palmer, the preponderance of evidence requires a conclusion that it will not contradict the environmental protection or public welfare purposes of KCC 21A.24.

Again, KCC 21A.24.070.B.1.d raises the term "minimum necessary" as a RUE criterion—the minimum necessary to allow for reasonable use of the property. Haener has installed an expensive, clever and sophisticated septic drainfield system with sprayers, distributors and alarms. It has been installed in hand-dug lateral trenches. This elaborate system, given the testimony of Stuth (representing the Applicant) and Ketchel (representing the Health Department) must be regarded as the minimum necessary to allow for reasonable use of the property. It certainly is the minimum necessary to obtain Health Department approval given the precarious conditions of the soils and steep slopes location.

14. The hearing record suggests that the area of septic drainfield placement has been covered with straw mulch, most of which has decomposed. KCC 21A.24.070.B.1.d also authorizes the Department to impose those conditions which are necessary to mitigate project impacts. Considering the steepness of these slopes, it is absolutely essential that the Department enforce an appropriate revegetation plan.

15. For the reasons indicated in conclusion nos. 1 through 13, above, the following decision and order are entered.

DECISION:

A. The Palmer Well No. 1 Water Association appeal is DENIED.

B. The appeals of Joe Haener are DENIED.

C. The Department's denial of variance is AFFIRMED. The reasonable use decision of the Department is AFFIRMED, subject to the modifications contained in the order which follows below.

ORDER:

A. For the reasonable use file record and for reference in other development permits, Applicant Haener shall file with DDES a revised site plan that accurately depicts the house built under L93VA010; approval of the reasonable use exception; and, accurate location of the top of the steep slope, 10-foot buffer and 15-foot BSBL. Final development plans must be submitted by the Applicant and approved by LUSD's staff geologist prior to issuance of a clearing and grading and/or building permit.

B. Prior to issuance of a clearing and grading and/or building permit the owner of the subject property shall file with King County records and elections department a revised sensitive areas Notice on Title that updates notes on the site plan map page by referencing approval of the Reasonable Use Exception and indicating the location of the new drainfield.

C. Following the recommendations of Associated Earth Sciences in their report of February 15, 2002 (exhibit 2-5, p. 17), the loose straw covering the drainfield shall be replaced with long-term-erosion-control matting. Woody vegetation shall be planted between each lateral drain and along the bottom edge of the last downslope drain. This planting plan must be reviewed and approved by the LUSD geotechnical engineer and by the Health Department.

D. All portions of the steep slope outside of the primary drainfield on which existing vegetation was altered shall be restored in accordance with the Sensitive Area Mitigation Guidelines promulgated by King County DDES.

E. The Applicant shall remove all structures and improvements within the 10-foot steep slope buffer and 15-foot BSBL and restore the steep slope buffer. Buffer restoration shall use native vegetation in accordance with the Sensitive Area Mitigation Guidelines.

F. Before the Department grants final inspection approval for house remodeling pursuant to permit application no. B00M2296, all steep slope and buffer restoration shall be approved by the Department, bonded consistent with Department requirements and properly installed. Both slope and buffer restoration can be covered by one planting plan and reviewed under the building permit for the house. The plantings must be inspected and approved by a representative of the Sensitive Areas Section of King County DDES.

ORDERED this 14th day of January, 2003

_____

T. T. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 14th day of January, 2003, to the parties and interested persons of record:

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NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision. The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.

MINUTES OF THE NOVEMBER 14, 2002 AND DECEMBER 3, 2002 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L01SAX13 and L01VA016

R. S. Titus was the Hearing Examiner in this matter. Participating in the hearings were Karen Scharer, Greg Wessel and Jeff Ketchel, representing the Department; Duana Kolouskova, representing Appellant Haener; Appellant Joe Haener; Steve Leitzke, Gary Beckham, William Stuth; Steve Bolliger and Peter Frame, representing Appellant Palmer.

The following exhibits were offered and entered into the record:

Exhibit No. 1	DDES preliminary report to the Hearing Examiner dated 07/19/02
Exhibit No. 2-1	Justification criteria for reasonable use variance no. L01SAX13, received 08/13/01
2-2	Justification for variance no. L01VA016, received 08/13/01
2-3	Project information received 02/01/01 with pre-application file
2-4	03/04/02 letter from D. Kolouskova to K. Scharer re: request for additional information
2-5	Geotechnical & Hydrogeological Study by Assoc. Earth Sciences, Inc., received by DDES on 03/04/02 (dated 02/15/2002)
2-6	Revised site plan from Leitzke Architects for Haener residence rcvd. 03/04/02 (7 pages A0.1-A0.3 and A1.0-A1.3)

2-7 Septic management agreement received 03/04/02
2-8 Letter from PoolPro Inc. to J. Haener dated 01/18/02 re: cleaning process
2-9 Clarification of facts—building and site improvements, rcvd. 03/04/02
2-10 Responses to comment letters, received 03/04/02
2-11 Letter from B. Norton, DDES Engineer, to S. Leitzke, architect, dated 12/06/00
2-12 Letter from G. Wessel, DDES Site Devel. Specialist to S. Leitzke, architect, dated 01/09/01
2-13 Letter from S. Leitzke, architect, to B. Norton, DDES Engineer, re: permit no. B00M2296 dated 01/20/01
2-14 Health Department records for septic/drain field on steep slope
2-15 Memo from J. Ketchel, Seattle-KC Public Health to K. Scharer dated 11/13/01
2-16 Email from J. Ketchel to K. Scharer dated 05/09/02 re: septic
2-17 Letter from K. Scharer to J. Haener dated 12/05/01 re: request for additional information
2-18 Phone log of K. Scharer re: conversation with R. Owens dated 09/24/01
2-19 Sensitive Area Notice for permit no. B93R3195 dated 02/18/94
2-20 Building permit B93R3195 and B9490755 file records
2-21 Zoning variance L93VA010 Report and Decision
2-22 Variance L93VA010 file records
2-23 KC GIS Mapping and property records for data reference
2-24 Assessor records for nearby properties dated 07/08/02
2-25 Haener contractor status per KC DDES records of 10/11/01
2-26 Letter from R. Mize and K. Conner dated 10/31/01 stating opposition to variance
2-27 Memo from P. & K. Frame dated 11/01/01 stating opposition (attached email dated 11/02/01)
2-28 Email from S. Bolliger dated 11/01/01 with attached letter from Palmer Well no. 1 Community Water Association member dated 11/01/01 expressing opposition
2-29 Email from K. Purcell dated 10/31/01 with attached letter dated 11/01/01 from Edgehill Water Association expressing concern
2-30 Map of top of steep slope, buffer and BSBL prepared by staff, dated 07/25/01

Exhibit No. 3 DDES file no. L02AP018
Exhibit No. 4 DDES file no. L02AP019
Exhibit No. 5 DDES supplemental report to the Hearing Examiner (undated)
Exhibit No. 6 DDES 2nd supplemental report to the Hearing Examiner (undated)
Exhibit No. 7 Architect's drawing (no A0.1) site plan/pool plan of Haener property annotated by Mr. Leitzke
Exhibit No. 8 Architect's drawing (no. A1.1) of Haener residence lower floor/wall section
Exhibit No. 9 Application for Land Use Permit for Joe Haener (undated)
Exhibit No. 10 Application for reasonable use: justification criteria for drainfield replacement on steep slope (undated)
Exhibit No. 11 Application for variance from the fifty-foot steep slope buffer and fifteen foot building setback line (undated)
Exhibit No. 12 Declaration of Robin A. Owen dated July 27, 2001
Exhibit No. 13 Declaration of Joseph Haener dated August 9, 2001
Exhibit No. 14 Declaration of William Stuth dated July 25, 2001
Exhibit No. 15 Seattle-King County Dept. of Public Health – on-site sewage disposal system as-built/certification of completion signed by Dept. representative on February 13, 2001

Exhibit No. 16	Record of sensitive area review for variance and exception applications dated January 10, 2001
Exhibit No. 17	Legal description
Exhibit No. 18	Geotechnical Engineering Study by Geotech Consultants, Inc. dated September 15, 1992
Exhibit No. 19	Letter from Bill Heaton of Seattle-King County Dept. of Public Health to Garen Willkens dated April 23, 1993, re: withdrawal of site application for on-site sewage disposal system
Exhibit No. 20	Letter from Jack R. Brooks to Gerald B. Cox dated May 20, 1993, re: septic installation
Exhibit No. 21	Letter from Jack R. Brooks to Ken Elliott dated May 20, 1993, re septic installation
Exhibit No. 22	Letter from Bill Heaton to Garen Wilkens dated June 25, 1993, re: recision letter
Exhibit No. 23	Diagram of drainfield layout from Brooks and Assoc. approved by King County Public Health Department on January 20, 1989
Exhibit No. 24	Site grading plan from Geotech Consultants (from original Site Grading Plan in Original Variance; L93VA1010 dated September 25, 2001)
Exhibit No. 25	Zoning variance report and decision transmitted November 9, 1993
Exhibit No. 26	Architect's map (no. A0.2) of site section/details dated July 25, 2001

The following exhibits were entered into the record at the December 3, 2002 hearing:

Exhibit No. 27	Applicant acknowledgement cover page dated November 14, 2000
Exhibit No. 27B	Permit Status from DDES re: built swimming pool without permits
Exhibit No. 28	Architect's plan sheet A0.0
Exhibit No. 29	Photographs of site improvements
Exhibit No. 30	Residential Corrections made by Garen Wilkens

RST:mls:gao
L01SAX13 & L01VA016 RPT